UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Polar Corp., Plaintiff, v. PepsiCo, Inc. and The Concentrate Manufacturing Company of Ireland, Defendants.	)	C.A. No. ____________

VERIFIED COMPLAINT FOR FEDERAL TRADEMARK INFRINGEMENT

INTRODUCTION

Plaintiff Polar Corp. ("Polar") brings this action against defendants PepsiCo, Inc. and its wholly-owned subsidiary The Concentrate Manufacturing Company of Ireland (collectively, "PepsiCo" or "Defendants") for federal trademark infringement in violation of 15 U.S.C. § 1114(1) and false designation of origin and unfair competition in violation of 15 U.S.C. § 1125(a). Polar owns the federal registered trademark POLAR, has owned and consistently used the trademark POLAR since at least 1902, and is also the owner of U.S. state trademark registrations in the states of Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia and West Virginia, for the term POLAR covering soft drinks and carbonated beverages. Polar is well-known throughout these regions for providing high quality, healthy seltzer waters, other carbonated beverages and waters.

Polar's claims arise out of PepsiCo's subsequent and unauthorized use of the confusingly similar POLAR SHOCK mark as part of its trademark and trade name in connection with competitive slush-type beverages. PepsiCo's branded Mountain Dew SHOCK products confirm the consumer impression PepsiCo is trying to create by combining a famous brand with the word "SHOCK." PepsiCo is of course free to do this with Mountain Dew SHOCK or certainly Pepsi SHOCK because PepsiCo owns those famous brands. However, PepsiCo cannot misappropriate the famous Polar brand for POLAR SHOCK. Accordingly, in this action, Polar seeks a preliminary and permanent injunction, compensatory and other damages that may be just and reasonable, and attorney's fees for violation of its rights.

PARTIES

1. Plaintiff Polar Corporation is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, with a principal place of business at 1001 Southbridge Street, Worcester, Massachusetts 01610.

2. Defendant PepsiCo, Inc. is a North Carolina corporation with a principal address at 700 Anderson Hill Road, Purchase, NY 10577.

3. Defendant The Concentrate Manufacturing Company of Ireland is an Ireland corporation with a principal address at Corner House, 20 Parliament Street, Hamilton, Bermuda HM 12, P.O. Box HM2090.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 15 U.S.C. §§ 1116, 1121, as this action arises under the United States trademark laws.

5. This Court has personal jurisdiction over both Defendants because, upon information and belief, they both conduct business in Massachusetts and have committed acts of trademark infringement in Massachusetts.

6. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because Polar is based in Worcester, Massachusetts and Defendants do business in, have substantial contacts with and a substantial part of the events giving rise to the claims herein occurred and continue to occur in this judicial district.

STATEMENT OF FACTS

I. Polar's Business and Trademarks

7. Polar is a fourth-generation, family-owned business that traces its roots back to 1882. Polar began as the J.G. Bieberbach Company in Worcester, Massachusetts, a bottler of seltzers and ginger ale and distributor of imported mineral water. Since 1968, Polar's main plant has been located at its present location on Route 290 in Worcester, Massachusetts. Today, Polar employs over 1,200 personnel throughout New England, New York, the Carolinas and Florida and is the nation's largest independent bottler of non-alcoholic beverages.

8. In 1992, the fourth generation took over Polar with Ralph Crowley, Jr., becoming President and CEO. Under his leadership, Polar has made numerous acquisitions for the rights to manufacture and distribute national brands such as 7Up, A&W Root Beer, Sunkist and Seagrams. Ralph's brother Christopher Crowley became Executive Vice President and Treasurer in 1999.

9. Under this fourth generation of Crowley leadership, Polar has undergone dramatic growth and change. For example, in 1996, Polar bought long-time competitor Adirondack Beverages in Scotia, New York, including a 650,000 square foot manufacturing facility.

Adirondack's product line includes Adirondack water and carbonated beverages, Waist Watchers carbonated beverages, and Clear 'n' Natural water as well as some private-label brands.

10. Despite this expansion, Polar has remained loyal to its Worcester, Massachusetts roots, where it decided to maintain its principal place of operations thereby ensuring the continued employment of over 600 local employees.

11. Polar manufactures, distributes and sells various products under its POLAR brand. These products include drinking water, iced teas, seltzer waters and various carbonated sodas and are sold in bottles, cans and through fountain services.

12. Polar has significant common law interests and rights in and to the term POLAR as a trademark for carbonated soft drinks, bottled water, seltzer water and other beverages, and has continually and substantially used the mark in interstate commerce in relation to such products since at least as early as 1902. Thus, Polar has owned and used the trademark POLAR for over 100 years.

13. Polar owns several incontestable trademark registrations for POLAR (Stylized), POLAR PURE and POLAR and Design, all in Class 32, as well as an approved application for POLAR (words only) in Class 32.

14. Polar is the owner of the following United States Federal Registrations and Application:

(a)
Word Mark (Stylized): **POLAR (Stylized)**

POLAR

Registration No.: 0,084,705
Registration Date: December 26, 1911
Application Date: July 26, 1910
Date of First Use: November 1900
Goods: Class 32 – Natural aerated water.

(b)
Word and Design Mark: **POLAR (and Design)**

Registration No.: 1,177,537
Registration Date: November 10, 1981
Application Date: February 1, 1980
Date of First Use: November 1900
Goods: Class 32 – Drinking water.

(c)
Word Mark: **POLAR PURE**
Registration No.: 2,743,648
Registration Date: July 29, 2003
Application Date: May 31, 2001
Date of First Use: June 2001
Goods: Class 32 – Drinking water, purified water.

(d)
Word Mark: **POLAR**
Application No.: 85/066,438
Application Date: June 18, 2010
Date of First Use: January 1, 1902
Goods: Class 32 – Drinking water, carbonated soft drinks, blended seltzer water and fruit based beverages.
Application Status: This Application has survived the opposition period without incident or objection and, upon information and belief, a registration will issue in the near future.

True and accurate copies of the records for the Trademark Office's Trademark Electronic Search System ("TESS") of the U.S. Trademark Registrations for Reg. Nos. 0084705, 1177537 and 2743648 and Application Ser. No. 85066438 are attached hereto as Exhibits 1-4, respectively.

15. Polar adopted and has consistently used the term POLAR as a trademark for a range of beverages including carbonated soft drinks, non-carbonated water, seltzer water, iced teas, and fruit juice and seltzer water blended beverages long before any date of first use that can be relied upon by Defendants.

16. In accordance with Sections 7(b), 22 and 33(a) of the Lanham Trademark Act, 15 U.S.C. §§ 1057(b), 1072, 1115(a), Registration Nos. 0084705, 1177537 and 2743648 constitute *prima facie* evidence of the validity of the registered marks and the registrations thereof, Polar's ownership of the marks shown in said registrations, and Polar's exclusive right to use the marks in commerce on or in connection with the goods named therein, without condition or limitation.

17. Polar is also the owner of U.S. state trademark registrations in the states of Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia and West Virginia, for the term POLAR covering soft drinks and carbonated beverages in International Class 32. Polar has used POLAR in connection with soft drinks within many of these various states since as early as 1902.

II. Polar's Use of its Trademarks

18. Polar has widespread and substantial sales of products designated by its POLAR trademarks. Polar sells its bottle and can beverage products in convenience stores and supermarkets throughout New England, Ohio and the East Coast of the United States.

19. Polar also sells fountain service carbonated beverages under the POLAR mark through the food service industry, including Wachusett Mountain Ski Area, The New England Aquarium, ADCARE Hospital, SODEXHO and in various restaurants in New York and New England.

20. Together with New York, Massachusetts represents one of the largest markets for sales of POLAR branded product.

21. Polar has spent substantial time and money in advertising and promoting its POLAR branded beverages to consumers of a wide variety of ages. Indeed, over the last five

years, Polar has spent on average well-over several million dollars per year promoting its POLAR branded beverages. A true and correct copy of web pages showing POLAR branded beverages at <www.polarbev. com> is attached hereto as Exhibit 5.

22. Polar advertises its beverage products in numerous magazines and newspapers, including, but not limited to, *The Boston Globe, Patriot Ledger, MetroWest Daily News, Worcester Telegram, Hartford Courant, Manchester Union Leader, Worcester Business Journal, Worcester Magazine*, and the *Griffin Report*. Polar also advertises on billboards, delivery trucks, outdoor media, vehicle wrap, electronic media, mobile marketing, Twitter, Facebook, My Space, and through event sponsorships, charitable relations, and its use of its trademark in coupons for Val-Pak. In addition, supermarkets selling POLAR branded beverages often include these beverages in weekly circulars mailed to residences and distributed in-store. A true and correct copy of a POLAR free standing insert coupon is attached hereto as Exhibit 6.

23. Polar also advertises its products on many radio and television stations throughout New England and New York, including WBZ, WTTK, WAAF, WCRN, WTAG, WBOS, WKLB, WJMN for radio and WBZ and WCVB for television.

24. Polar has also sponsored numerous events throughout New England, including, among many others, the Worcester First Night fireworks and the Polar Plunge at Wachusett Mountain, which helps raise money for Camp Sunshine, a camp for children with illnesses in Maine.

25. In the summer of 2010, Polar used its POLAR trademark in connection with its trademark "FIZZICALLY FIT" and sponsored the "Fizzically Fit Summer Tour of 2010" with Ayla Brown (the "Tour").

26. A marketing and advertising emphasis for the Tour focused on the high quality, healthy nature of POLAR beverages and targeted consumers both young and old.

27. Polar operates a website at <polarbev.com> and has had this website and an Internet presence since approximately 1997.

28. The trademark POLAR is featured prominently on the home page of <polarbev.com> as well as on numerous interior web pages.

29. Plaintiff's POLAR trademark is well-known by its customers and associated with its uncompromising standards, high quality, and the healthy nature of many of its beverages.

30. Such goodwill extends throughout the United States where POLAR beverages are sold and advertised, including Massachusetts, Connecticut, Maine, New Hampshire, Vermont, New York, Ohio, Pennsylvania, Rhode Island, North and South Carolina, Virginia, Tennessee, Minnesota, Maryland, Delaware, New Jersey, Florida and South Dakota.

31. Such goodwill also extends throughout Bermuda, where since June 2010, POLAR branded beverages have been distributed by the same company that distributes PepsiCo's products in Bermuda. Upon information and belief, this distribution company is a PepsiCo franchisee.

32. Indeed, Polar has such an extensive bottling and distribution business PepsiCo has engaged Polar to bottle and transport product under the PepsiCo-owned brands Gatorade and Izze.

33. By virtue of Polar's continuous marketing efforts and as a result of Polar's consistently producing high quality beverages, the POLAR brand has achieved widespread recognition and there is significant goodwill associated with the mark.

III. <u>Defendants' Business and Infringing Trademarks</u>

34. Upon information and belief, defendant The Concentrate Manufacturing Company of Ireland is a wholly-owned subsidiary of defendant PepsiCo, Inc.

35. Upon information and belief, PepsiCo is a global manufacturer of carbonated beverages and markets these beverages under many brands including PEPSI, MOUNTAIN DEW, SLICE and MUG ROOT BEER, among others.

36. PepsiCo products are in direct competition with Polar's beverage products.

37. Just like Polar, PepsiCo sells non-alcoholic beverages in consumer channels that include convenience stores, supermarkets, and fountain services, among others.

38. Defendant PepsiCo, Inc. advertises, markets, and promotes products for sale bearing the POLAR SHOCK marks on its websites, including the PepsiCoPOS website (<pepsicopos.com>), which provides for point of sales for PepsiCo products. A true and correct copy of the PepsiCoPOS web page is attached hereto as <u>Exhibit 7</u>.

39. POLAR SHOCK products are also advertised with Pepsi North America through the promotional agency Applebaum's website. A true and correct copy of the web page advertisement is attached hereto as <u>Exhibit 8</u>.

40. From Applebaum's web page, it is clear that POLAR SHOCK will be sold at "convenience stores and restaurants nationwide." <u>Exhibit 8</u>.

41. The PepsiCo Defendants sell, advertise, market and promote their non-carbonated, non-alcoholic frozen flavored, slush-like beverages to consumers in the United States under the confusingly similar mark POLAR SHOCK without authorization from Polar.

42. In the spring of 2010, defendant The Concentrate Manufacturing Company of Ireland filed intent-to-use applications for six (6) POLAR SHOCK marks for non-carbonated, non-alcoholic frozen flavored beverages in Class 32.

43. These six applications have been opposed by Polar at the Trademark Trial and Appeals Board.

44. The following are the six (6) applications for variants of the mark POLAR SHOCK applied for by PepsiCo, through its wholly owned subsidiary, The Concentrate Manufacturing Company of Ireland, including the opposition numbers which Polar has opposed:

(a)

Word Mark:	**POLAR SHOCK (Words only)**
Application No.:	85/013,730
Application Date:	April 14, 2010
Date of First Use:	N/A
Goods:	Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Opposition No.:	91197608

(b)

Word Mark:	**POLARSHOCK (Words only)**
Application No.:	77/961,210
Application Date:	March 17, 2010
Date of First Use:	N/A
Goods:	Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Opposition No.:	91197605

(c)
Word and Design Mark: **POLAR SHOCK (and Design)**

Application No.: 85/026,597
Application Date: April 29, 2010
Date of First Use: N/A
Goods: Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Opposition No.: 91197611

(d)
Word Mark: **POLAR SHOCK ORANGE FROST (Words only)**
Application No.: 85/020,548
Application Date: April 22, 2010
Date of First Use: N/A
Goods: Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Disclaimer: "ORANGE"
Opposition No.: 91197609

(e)
Word Mark: **POLAR SHOCK RAZZBERRY BLUES (Words only)**
Application No.: 85/013,719
Application Date: April 14, 2010
Date of First Use: N/A
Goods: Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Disclaimer: "RASBERRY"
Opposition No.: 91197607

(f)
Word Mark: **POLAR SHOCK SERIOUS STRAWBERRY (Words only)**
Application No.: 85/005,120
Application Date: April 2, 2010
Date of First Use: N/A
Goods: Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Disclaimer: "STRAWBERRY"
Opposition No.: 91197610

True and accurate copies of the TESS records for Trademark Application Nos. 85/013,730; 77/961,210; 85/026,597; 85/020,548; 85/013,719; and 85/005,120 are attached hereto as Exhibits 9-14, respectively.

45. On June 14, 2010, Polar, through its attorneys, sent a letter demanding that defendants PepsiCo, Inc. and The Concentrate Manufacturing Company of Ireland expressly abandon these six (6) applications for the POLAR SHOCK family of marks and cease their infringement of Plaintiff's registered POLAR trademarks. PepsiCo's counsel, as an authorized representative of The Concentrate Manufacturing Company of Ireland, refused by letter dated June 23, 2010.

46. In addition to the six (6) published applications which Polar has opposed, and *after* being contacted by Polar regarding its objections to those six (6) published applications and demanding that Defendants cease their infringing uses of Plaintiff's registered POLAR trademarks, on November 3, 2010, PepsiCo through its wholly owned subsidiary, The Concentrate Manufacturing Company of Ireland, filed the following four (4) additional trademark applications which have not yet been published for opposition:

(a)

Word Mark:	**POLAR SHOCK POTENT PEACH**
Application No.:	85/167,808
Application Date:	November 3, 2010
Date of First Use:	N/A
Goods:	Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Disclaimer:	"PEACH"

(b)

Word Mark:	**POLAR SHOCK VIVA MARGARITA**
Application No.:	85/167,786
Application Date:	November 3, 2010
Date of First Use:	N/A
Goods:	Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Disclaimer:	"MARGARITA"

(c)
Word Mark: **POLAR SHOCK CHILLA VANILLA**
Application No.: 85/167,774
Application Date: November 3, 2010
Date of First Use: N/A
Goods: Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Disclaimer “VANILLA”

(d)
Word Mark: **POLAR SHOCK MO MOCHA**
Application No.: 85/167,763
Application Date: November 3, 2010
Date of First Use: N/A
Goods: Class 32 – Non-carbonated, non-alcoholic frozen flavored beverages
Disclaimer: “MOCHA”

True and accurate copies of the TESS records for Trademark Application Nos. 85/167,808; 85/167,786; 85/167,774; and 85/167,763 are attached hereto as Exhibits 15-18, respectively. (Hereinafter, the marks in these four applications, together with the six applied for marks contained in Exhibits 9-14, are referred to as the “POLAR SHOCK family of marks”).

47. Polar reiterated to Defendants’ counsel its demand that all ten (10) POLAR SHOCK applications be abandoned in a letter dated November 16, 2010.

48. Defendants continued to refuse to abandon the applications and infringing behavior.

49. Upon information and belief, on or in the late fall of 2010, Defendants began selling POLAR SHOCK slush-type product in select convenience stores in Massachusetts, other select venues, and in certain sports arenas, including the Agganis Arena at Boston University. A true and correct copy of the web page for Agganis Arena is attached hereto as Exhibit 19.

50. Thus, with actual knowledge of Polar’s earlier use and of its registered trademarks, the PepsiCo Defendants refused to withdraw their infringing uses and applications for an entire family of at least 10 (ten) confusingly similar POLAR SHOCK marks in relation to

beverage products that are closely related to beverages sold and marketed by Polar under its POLAR mark and actually initiated infringing uses of the POLAR SHOCK mark.

51. Polar's rights in its POLAR mark with respect to goods in Class 32 are prior in time to any alleged date of first use, intent-to-use application, or any other date upon which Defendants may rely for any of their POLAR SHOCK family of marks.

52. Plaintiff's use of POLAR is earlier than any constructive or actual date of Defendants' use of POLAR SHOCK.

IV. Defendants' Deliberate and Willful Trademark Infringement

53. The POLAR SHOCK family of marks is very similar to Polar's POLAR mark.

54. Indeed, PepsiCo's mark POLAR SHOCK is virtually identical to Plaintiff's POLAR trademark, the only difference being the addition of the word "SHOCK."

55. PepsiCo's mark POLAR SHOCK looks and sounds confusingly similar to Plaintiff's POLAR mark and wrongly suggests that Plaintiff is somehow manufacturing, promoting, selling or sponsoring the Defendants' beverage product.

56. The term "POLAR" is the first term in The Concentrate Manufacturing Company of Ireland's applied-for mark and is the first word that will be read by consumers of PepsiCo's product.

57. POLAR is the primary and dominant feature in every one of Defendants' POLAR SHOCK marks and inevitably an integral component in the commercial impression that each of the POLAR SHOCK marks makes on such consumers.

58. Indeed, the mark POLAR SHOCK so resembles Polar's previously used and registered POLAR mark and creates such a similar commercial impression to Polar's POLAR

marks as to be likely, when applied to the goods sold by the PepsiCo Defendants, to cause confusion, mistake or deception.

59. PepsiCo's frozen, non-alcoholic, non-carbonated beverages marketed under the POLAR SHOCK marks are similar and competitive with Polar's POLAR branded beverages.

60. PepsiCo's POLAR SHOCK beverages are marketed and sold to the same or overlapping demographic profile of customers in convenience stores, supermarkets, and fountain services as Polar's beverages. Both the POLAR mark and the POLAR SHOCK marks are also used by their respective owners on cups, on beverage dispensers and in point of purchase materials in retail establishments.

61. PepsiCo is well aware of Polar's business and of the goodwill represented by Polar's POLAR trademarks.

62. Polar products are widely distributed throughout New England, New York and much of the United States and Bermuda.

63. PepsiCo and Polar have an existing business relationship.

64. Senior executives at PepsiCo and Polar have served together on the American Beverage Association and have a long-standing professional relationship.

65. After counsel for Polar and PepsiCo exchanged correspondence concerning the POLAR SHOCK family of marks, executives for PepsiCo and Polar directly discussed Polar's demand that PepsiCo cease and desist its infringing use of the POLAR trademark.

66. Nonetheless, in deliberate and willful disregard of Polar's demands and with PepsiCo's long-standing knowledge and awareness of the POLAR trademark, the PepsiCo Defendants have continued to refuse to cease their use of the infringing POLAR SHOCK mark.

67. In addition to the POLAR SHOCK marks, Defendant PepsiCo, Inc. is the owner of record of U.S. Registration No. 0820362 for MOUNTAIN DEW covering "soft drinks, and concentrates used in the preparation thereof"; U.S. Registration No. 3674349 for MTN DEW, covering, "concentrates, syrups or powders used in the preparation of soft drinks; soft drinks"; U.S. Registration No. 2,667,351 for the mark MOUNTAIN DEW BLUE SHOCK and U.S. Registration No. 3,673,766 for the mark MOUNTAIN DEW BLUE SHOCK FREEZE, both covering "semi-frozen soft drinks," in Class 32. True and correct copies of the TESS records for these registrations are attached as Exhibits 20-23.

68. Defendant PepsiCo, Inc. is also the owner of record of U.S. Application Ser. No. 85/166,460 for the mark MTN DEW BLUE SHOCK covering, "concentrates, syrups or powder used in the preparation of soft drinks, soft drinks," in Class 32. A true and correct copy of the TESS record for this application is attached as Exhibit 24.

69. Upon information and belief, defendant PepsiCo, Inc., The Concentrate Manufacturing Company of Ireland's wholly-owning parent, is manufacturing and selling carbonated beverages under the MOUNTAIN DEW and MTN DEW marks and manufacturing and selling semi-frozen beverages under the MOUNTAIN DEW BLUE SHOCK and MOUNTAIN DEW BLUE SHOCK FREEZE marks.

70. Based upon its trademark application Ser. No. 85/166,460, PepsiCo is planning to manufacture and sell carbonated beverages under the mark MTN DEW BLUE SHOCK.

71. Thus, defendants PepsiCo's MOUNTAIN DEW family of marks includes MOUNTAIN DEW, MTN DEW, MOUNTAIN DEW BLUE SHOCK FREEZE, and MTN DEW BLUE SHOCK, with at least one of these marks, MTN DEW BLUE SHOCK, specifically covering both soft drinks and semi-frozen beverages.

72. Defendants are using, have used in commerce, and propose use in commerce of the term "SHOCK" in connection with their MOUNTAIN DEW and MTN DEW marks to identify carbonated beverages and semi-frozen slush products, which use is not objected to by Plaintiff.

73. Defendants have used and continue to use and propose to expand their use of a mark that originally identified a carbonated beverage to also identify a semi-frozen beverage.

74. PepsiCo, Inc.'s wholly-owned subsidiary The Concentrate Manufacturing Company of Ireland has applied for a family of ten (10) marks that all include the term POLAR followed by the term SHOCK.

75. The positioning of the term POLAR as the first term in the POLAR SHOCK family of marks is identical to the positioning of MOUNTAIN DEW / MTN DEW first in the MOUNTAIN DEW BLUE SHOCK marks.

76. The Defendants' use of POLAR in this manner is thus deliberately and willfully infringing Polar's rights in its POLAR mark and is highly likely to be confusing to consumers as to the source of Defendants' "SHOCK" products.

77. Upon information and belief, PepsiCo's branded Mountain Dew SHOCK products confirm the consumer impression PepsiCo is trying to create by combining a famous brand with the word "SHOCK." PepsiCo is of course free to do this with Mountain Dew SHOCK or certainly Pepsi SHOCK because PepsiCo owns those famous brands.
However, PepsiCo cannot misappropriate the famous Polar brand for POLAR SHOCK.

78. The PepsiCo Defendants are wrongfully, willfully and deliberately using the POLAR trademark without permission from Plaintiff in connection with their "SHOCK" products in violation of Plaintiff's long-established trademark rights in the POLAR trademark.

79. The Concentrate Manufacturing Company of Ireland's Class 32 goods, "non-carbonated, non-alcoholic frozen flavored beverages" are highly related to beverages, including soft drinks, identified by Polar's POLAR mark and will be related in the minds of the consuming public.

80. The public will be further confused because such goods, namely carbonated beverages and semi-frozen beverages, are often produced by one manufacturer, including without limitation, by PepsiCo, Inc.

81. Polar distributes its POLAR branded drinks in a variety of forms including in the form of bottled beverages and in the form of soda fountain beverages.

82. Upon information and belief, the POLAR SHOCK beverages are sold through fountain service machines or stations. A true and correct copy of the web page displaying the POLAR SHOCK fountain dispensing machine is attached hereto as Exhibit 25.

83. The POLAR SHOCK beverage products and Polar's POLAR beverage products therefore are dispensed in similar fashion by fountain service machines.

84. Polar's POLAR drinks and Defendants' POLAR SHOCK drinks will be sold in the same channels of trade, including, for example, convenience stores, amusement parks and event venues.

85. In addition, Plaintiff's and Defendants' products are or will be both sold and promoted, upon information and belief, throughout Massachusetts, Connecticut, Maine, New Hampshire, Vermont, New York, Ohio, Pennsylvania, Rhode Island, North and South Carolina, Virginia, Tennessee, Minnesota, Maryland, Delaware, New Jersey, Florida, South Dakota and Bermuda.

86. Upon information and belief, consumers of Polar's products and Defendants' POLAR SHOCK products make purchase decisions that may rely on quick, buyer impulse choices.

87. The casual and impulsive nature of those purchase decisions increases the likelihood of confusion when the consumers are confronted with the similarities between the POLAR and POLAR SHOCK marks.

88. Upon information and belief, POLAR beverages and Defendants' POLAR SHOCK beverages are sold for similar prices and compete for the same consumer regarding that consumer's decision to purchase a beverage. A true and correct copy of POLAR SHOCK and PepsiCo promotional material found at <http://issuu.com/hodavies/docs/polar_shock> is attached hereto as Exhibit 26.

89. Upon information and belief, non-carbonated, non-alcoholic frozen flavored beverages and other beverages such as iced teas, water and carbonated beverages, are often found in close proximity to each other in retail outlets that sell both frozen flavored beverages and other beverages.

90. In view of the presence in the marketplace of Plaintiff's POLAR trademark on the one hand, and the presence of MOUNTAIN DEW, MTN DEW, MTN DEW BLUE SHOCK and MOUNTAIN DEW BLUE SHOCK FREEZE, on the other, and the recent and aggressive attempt by Defendants to expand the SHOCK brand of beverages to include a new POLAR SHOCK family of marks, consumers will likely be confused and left to wonder whether or not a "SHOCK" branded product is endorsed by or from Polar.

V. <u>Harm Caused by Defendants' Infringement</u>

91. Consumers are likely to believe that the drinks offered under Defendants' POLAR SHOCK family of marks are produced by or are authorized, endorsed, related to or sponsored by Polar.

92. Consumers are likely to expect that the POLAR SHOCK products are of the same high quality and standards as the Polar products.

93. Polar has no control over the quality of the products or the public perception of those products that the PepsiCo Defendants offer under the POLAR SHOCK family of marks.

94. Any failure, neglect, or default by the PepsiCo Defendants or negative public perception of PepsiCo or the POLAR SHOCK products will reflect adversely upon Polar.

95. In this instance, this risk of negative public perception is heightened because of the choice by Polar to market, at least in part, its products as healthy, FIZZICALLY FIT products. A true and correct copy of a photograph of a billboard advertisement showing Polar's FIZZICALLY FIT mark is attached hereto as <u>Exhibit 27</u>.

96. Upon information and belief, the POLAR SHOCK products appear to be sugary, slush-type beverages. A true and correct copy of the web pages for various POLAR SHOCK beverages found at <http://pepsiproductfacts.com/infobyproduct.php> and showing ingredients for the products, including high fructose corn syrup, is attached hereto as <u>Exhibit 28</u>.

97. The favorable goodwill that Polar has developed in POLAR is at risk as a result of PepsiCo's use of the confusingly similar POLAR SHOCK family of marks.

98. Defendants' use of POLAR SHOCK, if permitted, will lessen the capacity of Polar's trademark POLAR to identify and distinguish Polar's products, thereby causing harm to Polar.

99. Polar has suffered and will continue to suffer irreparable harm as a result of Defendants' use of the POLAR SHOCK marks in connection with the sale of beverages.

100. Polar believes that, unless enjoined by this Court, Defendants intend to continue their course of conduct and wrongfully use, infringe upon and otherwise profit from Polar's registered, incontestable trademark.

101. Polar has no adequate remedy at law to address all of the injuries that Defendants have caused and intend to cause by their conduct.

COUNT I
(Federal Trademark Infringement Under 15 U.S.C. § 1114(1))

102. Polar restates and incorporates by reference the allegations contained in paragraphs 1 through 101 as if fully set forth herein.

103. Polar owns the U.S. Trademark Registrations for Reg. Nos. 0084705, 1177537 and 2743648.

104. Polar has used the marks shown in Reg. Nos. 0084705, 1177537 and 2743648 since a date prior to any date on which Defendants may rely.

105. The Concentrate Manufacturing Company of Ireland's POLAR SHOCK mark is similar to Plaintiff's POLAR trademarks in appearance, sound, and commercial impression.

106. Defendants' products using the POLAR SHOCK mark are confusingly similar to, related to and directly competitive with Polar's products set forth in marks shown in Reg. Nos. 0084705, 1177537 and 2743648.

107. Defendants manufacture, sell, offer to sell, distribute or advertise to the same customers and through the same channels of trade as Polar.

108. Defendants sell, offer for sale, distribute or advertise goods on or in connection with the POLAR SHOCK mark such that it is likely to cause confusion, or to cause mistake or to

deceive the relevant consuming public as to the source of the goods or the affiliation, connection or association of the Defendants with Plaintiff in violation of 15 U.S.C. § 1114(1), Section 32(1) of the Lanham Act.

COUNT II
(False Designation of Origin and Unfair Competition Under 15 U.S.C. § 1125(a))

109. Polar restates and incorporates by reference the allegations contained in paragraphs 1 through 108 as if fully set forth herein.

110. Polar owns the trademark POLAR. Polar has owned and consistently and substantially used the trademark POLAR since at least 1902, and is also the owner of numerous U.S. state trademark registrations for the term POLAR covering soft drinks and carbonated beverages.

111. Polar also owns common law interest and rights in and to the term POLAR as a trademark for carbonated soft drinks, bottled water, seltzer water and other beverages, and has continually and substantially used the mark in interstate commerce in relation to such products since at least as early as 1902

112. Accordingly, Polar adopted and has consistently used the term POLAR as a trademark for a range of beverages including carbonated soft drinks, non-carbonated water, seltzer water, iced teas, and fruit juice and seltzer water blended beverages prior to any date upon which Defendants may rely.

113. In addition, Polar has an application pending for the POLAR mark shown in the Application Ser. No. 85066438. This application, which was filed prior to any date upon which Defendants may rely, has survived the opposition period without incident in the United States Patent and Trademark Office. Upon information and belief, a registration for this application is expected to issue in the near future.

114. Defendants' POLAR SHOCK mark is similar to Plaintiff's POLAR trademark in appearance, sound, and commercial impression.

115. Defendants' POLAR SHOCK branded products are confusingly similar to, related to and directly competitive with Polar's products.

116. Defendants manufacture, sell, offer to sell, distribute, use in commerce or advertise to the same customers and through the same channels of trade as Polar.

117. Defendants sell, offer for sale, distribute, advertise, or use in commerce goods on or in connection with the POLAR SHOCK family of marks such that the conduct is likely to cause confusion, or to cause mistake or to deceive the relevant consuming public as to the source of the goods or the affiliation, connection or association of the Defendants with Plaintiff in violation of 15 U.S.C. § 1125(a), Section 43(a) of the Lanham Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Polar requests judgment against Defendants PepsiCo, Inc. and The Concentrate Manufacturing Company of Ireland as follows:

1. That the Court adjudge that Plaintiff's trademarks have been infringed as a direct and proximate result of the Defendants' acts as set forth herein.

2. That Defendants and their respective agents, servants, employees, officers, directors, successors, licensees and assigns, and all those in active concert or participation with them, be preliminarily and permanently enjoined from:

(a) using in any form or manner (i) POLAR SHOCK; (ii) POLAR SHOCK ORANGE FROST; (iii) POLAR SHOCK RASBERRY BLUES; (iv) POLARSHOCK; (v) POLAR SHOCK; (vi) POLAR SHOCK SERIOUS STRAWBERRY; (vii) POLAR SHOCK POTENT PEACH; (viii) POLAR SHOCK VIVA MAGARITA; (ix) POLAR SHOCK CHILLA VANILLA; (x) POLAR SHOCK MO MOCHA or any confusingly similar trademark, trade name, domain name, email address or internet search keywords or advertisement word anywhere in the United States;

(b) engaging in any conduct which will cause or is likely to cause confusion, mistake or misunderstanding as to the source, affiliation, connection, or association of Defendants or Defendants' products, promotions, sales or advertisements with Polar or Polar's products, promotions, sales or advertisements; and

(c) otherwise infringing upon Polar's trademark rights or unfairly competing with Polar in any manner whatsoever.

3. That Plaintiff be awarded Defendants' profits and Plaintiff's actual damages arising from Defendants' use of the infringing POLAR SHOCK family of marks.

4. That Plaintiff be awarded treble damages in view of the intentional and willful nature of Defendants' infringement pursuant to 15 U.S.C. § 1117.

5. That Plaintiff be awarded reasonable attorney's fees and taxable costs in view of the intentional and willful nature of Defendants' infringement under 15 U.S.C. § 1117.

6. That Defendants be ordered to deliver for destruction all documents and things bearing the POLAR SHOCK family of marks pursuant to 15 U.S.C. § 1118.

7. That the Court award Polar such other relief as this Court deems just and proper.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE

Respectfully submitted,

POLAR CORP.,

/s/ Mark D. Meredith

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Dated: January 25, 2011

VERIFICATION

I, Ralph D. Crowley, President and CEO of Polar Beverages, hereby certify, under the penalties of perjury: (a) that I have read the foregoing Verified Complaint; and (b) that the allegations contained in the Verified Complaint are true and accurate based upon my personal knowledge, except such allegations as are made upon information and belief, which allegations I believe to be true.

Dated: January 24, 2011 ______________________________

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